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No. 92-936

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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT KEITH NEELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

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1. Petitioner was indicted by a grand jury sitting in the United States District Court for the Western District of Virginia. He was charged with conspiracy to defraud the United States by interfering with grand jury secrecy, in violation of 18 U.S.C. 371; obstruction of justice, in violation of 18 U.S.C. 1503; and criminal contempt, in violation of 18 U.S.C. 401(3).

Petitioner moved to dismiss the indictment on the ground that the government failed to present exculpatory evidence to the grand jury. Specifically, he alleged that the government did not present to the grand jury a co-conspirator's pretrial statement in which she stated that petitioner did not solicit the secret grand jury material from her. On April 3, 1991, the district court dis-

missed the indictment on the ground that the government had failed to present the co-conspirator's exculpatory evidence to the grand jury and that the grand jury would not have returned an indictment if it had been properly instructed as to the significance of the co-conspirator's evidence. Pet. App. 10-12.

The court of appeals reversed. Pet. App. 1-4. The court ruled that an indictment may not dismissed on the ground that it was not supported by adequate or competent evidence. Relying on this Court's recent decision in *United States* v. *Williams*, 112 S. Ct. 1735 (1992), the court further ruled that an otherwise valid indictment may not be dismissed on the ground that the prosecutor failed to present allegedly exculpatory evidence to the grand jury. Pet. App. 3-4.

2. Petitioner contends (Pet. 9-12) that the prosecutor improperly failed to present exculpatory evidence to the grand jury. Whatever the merits of petitioner's contention, it is not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

DECEMBER 1992